[redacted]

OCTOBER TERM, 1974

No. 74-1610

RICHARD H. OLSEN,
Petitioner

v.

SAUL GOODMAN,
Respondent

REPLY TO BRIEF IN OPPOSITION

Robert D. Peloquin, Esquire
Counsel for Petitioner
1707 - H Street, N.W.
Suite 400
Washington, D.C. 20006

John W. Prunty, Esquire
Counsel for Petitioner
807 City National Bank
Miami, Florida 33130

MIAMI REVIEW — 371-4000 — 377-3721

TABLE OF CONTENTS

	Page
Reply To Brief In Opposition	1
Appendix	A-1

CITATIONS

Case

Cox Broadcasting Corp. v. Cohn, 420 US 469, 497 (1975)	2
Kyle v. Kyle, 139 So.2d 885, 887 (1962)	5
Local No. 438 v. Curry, 371 US 542 (1971)	3
New York ex rel Bryant v. Zimmerman, 278 US 63, 73 L.Ed 184, 49 S.Ct. 61 (1928)	4
Nielsen v. The City of Sarasota, 117 So.2d 731 (1960)	5
Organization For A Better Austin v. Keefe, 402 US 415 (1971)	3
Pope v. Atlantic C.L.R. & Co., 345 US 379 (1953)	3
State of Florida, ex rel, The Florida Bar v. Delves, 160 So.2d 114 (1964)	6, 7
The Florida Bar v. Pitts, 219 So.2d 427 (1969)	6, 7

in the
Supreme Court
of the
United States

OCTOBER TERM, 1974

No.

RICHARD H. OLSEN,
Petitioner

v.

SAUL GOODMAN,
Respondent

REPLY TO BRIEF IN OPPOSITION

In accordance with the provisions of Rule 24.4, this Reply will be limited to arguments first raised in Respondent's Brief in Opposition.

BLEED THROUGH

I

Respondent asserts that the Judgment of the Supreme Court of Florida entered November 7, 1974, remanding the cause for retrial, was not a Final Judgment.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 497 (1975), this Court discussed at length the question of what constitutes a final judgment under 28 U.S.C. 1257. It concluded that there are now at least four categories of cases wherein it has treated resolution of a Federal issue by a State Supreme Court as a "final judgment" for the purposes of 28 U.S.C. 1257 and has taken jurisdiction without awaiting completion of additional proceedings in lower State courts. Though each category has merit and applicability to the case *sub judice*, the first category is directly on point.

In describing the category of cases, this Court said:

> "In the first category are those cases in which there are further proceedings—even entire trials —yet to occur in the state courts but where for one reason or another the federal issue is conclusive or *the outcome of further proceedings preordained.* In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final. In *Mills v. Alabama*, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966), for example, a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The State Supreme Court reversed, remanding for jury trial. This Court took

jurisdiction on the reasoning that the appellant had no defense other than his federal claim and could not prevail at the trial on the facts or any nonfederal ground. To dismiss the appeal 'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in the judicial systems already troubled by delays due to congested dockets.' Id., at 217-218." (emphasis supplied.)

In the instant case, the Supreme Court of Florida reversed the *per curiam* affirmance by the District Court of Appeal of the jury verdict in favor of the Petitioner. The Court remanded the case to the trial Court for a new trial but struck the defense of usury, the only defense interposed by the Petitioner at the trial. Though this case was tried in Florida the applicable law was that of New York where the defense of usury is a substantive defense and is available to the Petitioner. The Florida Supreme Court, by its refusal to give effect to a substantive defense permitted under the laws of New York, denied the Petitioner due process of law and subjected him to irremedial liability. Without the defense of usury, the outcome of further proceedings is preordained. Hence, the Judgment of the Supreme Court of Florida is for the purpose of this appeal a "final judgment or decree."

Additional cases supporting this position are: *Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971); *Local No. 438 v. Curry*, 371 U.S. 542 (1963); *Pope v. Atlantic C.L.R. & Co.*, 345 U.S. 379 (1953).

BLEED THROUGH

II

Respondent asserts that the questions raised in the Petition for a Writ of Certiorari were not raised below.

The controlling principle as to a sufficient presentation of a Federal question is set forth in the case of *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63 at 67, 73 L.Ed. 184, 49 S.Ct. 61 (1928), where this Court said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground thereof be brought to the attention of the state court with fair precision and in due time. And, if the record as a whole shows either expressly of by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

The proceedings in this case at the trial and District Court of Appeal level involved no Federal questions and matters herein were properly considered and determined. The Federal issues involved arose from the Judgment of the Supreme Court of Florida on November 7, 1974, where the Court reversed the Trial Court and District Court of Appeal. Substituting itself for the jury as the trier of fact, that Court not only misconstrued the facts of the case but refused to apply the applicable New York law. The first and the only opportunity available to the Petitioner to raise a Federal question and contest the judgment of the Supreme Court of Florida was in the Petition for Re-

hearing. Thus, the raising of issues which are inherently federal questions at that time should be construed as timely and proper. As will be seen in Respondent's Appendix D, Petitioner in Paragraph 1 of his Petition for Re-Hearing, raised the question of the Supreme Court of Florida applying Florida decisions on Florida law in a cause where the laws of the State of New York governed.

III

Respondent's Brief urges that this Court will not review the judgment of the Supreme Court of Florida as to its jurisdiction in this matter under the Florida Constitution.

The general rule adopted by this Court that it will not review a judgment of a State Court where it is contended that the court exceeded the powers granted it by the State Constitution should not be followed blindly but should be considered in light of all of the facts surrounding the case.

The Supreme Court of Florida itself recognized, in the case of *Nielsen v. The City of Sarasota*, 117 So.2d 731 (1960), that its power to issue writs of certiorari was substantially restricted and drastically circumscribed by the adoption of a Constitutional Amendment in July of 1957. To clarify the criteria necessary to obtain conflict jurisdiction for a writ of certiorari, the Court, in the case of *Kyle v. Kyle*, 139 So.2d 885, at 887 said:

> "We have said that conflict must be of such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter."

BLEED THROUGH

In the case *sub judice* two Florida cases, *State of Florida, ex rel, The Florida Bar v. Delves*, 160 So.2d 114, (1964), and *The Florida Bar v. Pitts*, 219 So.2d 427 (1969), were presented to the Florida Supreme Court to support conflict jurisdiction necessary for the issuance of a writ of certiorari. Both of these cases concerned themselves with the disciplining of attorneys, initiated by the filing of a grievance with the Florida Bar Association, which grievance is governed by the Integration Rules of that Association. The Integration Rules, quasi-criminal in nature, are administrative regulations relevant only to Florida proceedings. The Respondent, in his Brief In Opposition To Petition For Writ of Certiorari, on pages 22 and 23, admits that both the *Delves* and *Pitts* cases, *supra*, set forth the *Florida* law on estoppel to claim usury by an attorney. The Florida law is not applicable to this case and the issues are governed by the statutory laws of New York. Thus no conflict can exist. How, then, can the Supreme Court of Florida justify its assertion of jurisdiction on the basis of conflicting decisions where the cases cited by it have absolutely no application to New York law, in a proceeding where only New York law is applicable?

Unlike the *Delves* and *Pitts* cases, the present case does *not* involve a disciplinary proceeding against an attorney. On January 22, 1973, while Respondent's initial Petition for a Writ of Certiorari was pending before the Florida Supreme Court, Respondent filed a grievance with the Florida Bar Association against the Petitioner on charges similar to those alleged in the respondent's Brief in Opposition. After a full investigation and hearing, the Grievance Committee entered a Notice of No Probable

Cause. A copy of the Grievance, Notice of Hearing and Determination are printed as Appendices A, B, and C hereto.

It is appropriate at this time to correct a misconception which runs throughout Respondent's Brief. A reading of the Brief in conjunction with the *Delves* and *Pitts* cases *supra*, would lead one to believe that the Petitioner had alone prepared the agreement, but this is not so. The facts of record are that although the agreement was handwritten by the Petitioner, the terms and conditions were dictated to the Petitioner by the Respondent. Printed as Appendix D hereto are pages 224 and 225 of the Trial Transcript.

In examining the Supreme Court of Florida's assertion of jurisdiction, this Court should consider the matter in light of the uncontradicted testimony taken at the Impeachment Hearings held on three of the Justices who sat on Panels adjudicating this case. The Impeachment Committee Hearings were held subsequent to the Judgment entered by the Court, and the testimony and exhibits showed serious irregularities in the handling of this case.

By way of illustration, the records of the Supreme Court of Florida in this case (previously confidential), on the first appeal show that a vote was taken on the matter of jurisdiction and the vote was four to one to deny same. Justice McCain was one of the four who voted to deny. A memorandum was prepared recommending denial (Appendix H, Pages A-26, 27, Petition for Writ of Certiorari). No order issued from the Court, however, denying jurisdiction. Instead, a conference was held on Feb-

ruary 1, 1973, (Appendix H, Page A-22, Petition for a Writ of Certiorari) and the case was subsequently reassigned, which is irregular in itself, to Justice McCain who then wrote a memo on jurisdiction on February 5, 1973, recommending grant of jurisdiction without oral argument. This was done by a vote of four to one. A copy of the instrument showing the two votes is printed as Appendix E hereto. This document was obtained from the Clerk of the Supreme Court of Florida subsequent to the filing of Petitioner's Petition for a Writ of Certiorari with this Court. The existence of this document was not known at the time of the filing of the Petition.

The Petitioner does not seek to challenge the integrity of certain members of the Panels who sat in judgment in this cause but does seek to have this Court closely examine all of the actions of the Court in the handling of the instant case.

Respectfully submitted,

/s/ Robert D. Peloquin, Esquire
Counsel for Petitioner
1707 - H Street, N.W.
Suite 400
Washington, D.C. 20006

John W. Prunty, Esquire
Counsel for Petitioner
837 City National Bank
Miami, Florida 33130